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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215813
Party	Defendant International Pastry Concepts LLC
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In the Matter of Trademark

Application Serial No. 85936327

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Opposition No. 91215813

**NAJAT KANACHE and
CRYSTALLINE MANAGEMENT,
LLC,**

Opposers

v.

**INTERNATIONAL PASTRY
CONCEPTS LLC and
DOMINIQUE ANSEL,**

Applicants

REPLY MEMORANDUM OF LAW IN SUPPORT OF APPLICANTS' MOTION TO
DISMISS NOTICE OF OPPOSITION FOR FAILURE TO STATE A CLAIM FOR WHICH
RELIEF MAY BE GRANTED PURSUANT TO FED. R. CIV. P. 12(b)(6)

International Pastry Concepts LLC and Dominique Ansel ("Applicants") respectfully submit this Reply in further support of its Motion to Dismiss the Notice of Opposition ("Opposition") on the grounds that Opposers Najat Kaanache ("Opposer Kaanache") and Crystalline Management LLC ("Opposer CM") or (collectively, "Opposers") lack standing to bring the Notice of Opposition and, alternatively, fail to state a claim upon which relief can be granted.

Introduction

Opposers' response to Applicants' Motion to Dismiss is woefully inadequate, failing to provide any support for its position, erroneously dismissing Applicants' strong evidence as irrelevant and attempting to confuse both facts and law. Opposers' elementary drafting mistakes in both the Notice of Opposition and Response to Applicant's Motion to Dismiss continue and their drafting goes so far as to misrepresent actual facts on the record while notably including

Opposers' own averment that "Opposers CRONUT application should, therefore, be denied registration."¹ For the record, Applicants assert the accuracy and relevance of Applicants' Motion to Dismiss and urge this panel to take note of Opposers' brazen suggestion that they need show nothing by way of legal arguments or facts as to why their Opposition should withstand a Motion to Dismiss. Further, Opposers have accused Applicants' counsel of fraud where none exists while attempting to convince the Board of facts which are false and unsupported by the USPTO record.

Opposers' failure to provide more than conclusory statements is a galling attempt to put forth a cause of action without justification. Opposers' pleadings reveal a lack of substantive argument, evidence or even the slightest attempt to answer in a manner fitting this procedure. It is outrageous for Opposers to insist that burdensome, expensive and inefficient discovery be taken in a case where they have a) engaged in misleading, false and inaccurate statements to this Board; b) failed to meet the minimum pleading requirements to establish a real interest or reasonable belief of damages; c) where no valid claims exist; and d) failed to show respect or deference to the Board and the consuming public.

Opposers fail to offer a single reason as to how discovery would be prudent in a case where they rely solely upon misrepresentations to make a case where no cognizable claims exists. Opposers' response is nothing more than a collection of broad allegations that fail to meet even the minimal requirements to withstand a Motion to Dismiss.

The purpose of the Lanham Act is to protect the consuming public from the free-riding, intermeddling conduct that is on full display by the Opposers who appear to have a vested interest in circumventing this purpose. "Because we say so..." is not a colorable legal argument and Opposers' sheer lack of evidence or minimal effort to convince the Board as to why it should accommodate such a prospect is telling. If the Board entertained every Opposition as shallow and ill-conceived as the instant case, trademarks would never be granted. Opposers continue to reveal

¹ Amended Opposition at 15.

themselves as duplicitous free-riders attempting to cash in on the good name and fame of Applicants. This Opposition is such a sham that Opposers resort to misrepresenting the USPTO record while repeating baseless accusations of fraud along with other furtive untruths. It is clear that Opposers' vexatious and harassing conduct is solely for Opposers' own gain. Further, this deplorable and abhorrent conduct reveals an unethical disregard for the decorum of this panel.

Opposers offer only self-deprecating and trivial evidence which strongly suggests there is nothing else. If there were more probative evidence, it is doubtful that Opposers would quote from an incriminating article calling them out on their behavior and offering up one food critic's harsh review of their alleged goods. Their reliance upon a one-word reference to a "donut" in a deleterious review of Opposers' goods combined with the description of the word "doughnut" from an on-line dictionary reveals Opposers' end-game for what it is: an unabashed attempt to cash-in on Applicants' good name and fortune and a flagrant disregard for the truth.

Opposers Lack Standing Without A Real Interest or a Reasonable Belief of Damages

Opposers fail to satisfy the two-pronged requirement for standing whereby they must show a real interest and a reasonable belief of damages.² The operative words are "reasonable" and "real" and Opposers fail on each count. It is telling that instead of pleading their interest with any kind of specificity, Opposers instead rely upon the "general public" interest as discussed in *Ritchie* rather than setting forth, even a remote source of their damage. In *Ritchie*, the question was whether or not the mark was "scandalous" and the inquiry was one of whether or not a portion of the general public would perceive it to be so. As a member of the public, Mr. Ritchie was found to have standing. Opposers cannot demonstrate that others share their belief of damages and their vague recitations of the "public interest" portions of *Ritchie* are clearly misplaced and inapplicable to the instant case.

² *Ritchie v. Simpson*, 170 F.3d 1092 (Fed. Cir., 1999).

To survive a motion to dismiss Opposers must plead and prove standing by raising a right to relief **above the speculative level** and must contain enough facts to state a claim that is plausible on its face.³ The plausibility standard must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these specific claims. This standard requires more than “a sheer possibility”⁴ and disallows complaints that are—as here—no more than labels and conclusions. Despite the fact that “a formulaic recitation of the elements of a cause of action will not do,”⁵ Opposers fail to provide the required factual content which would allow the court to draw the reasonable inference that Applicants are liable for alleged misconduct.⁶

As fully briefed in Applicants’ Motion to Dismiss, Opposers fail to provide a date for the alleged “sweet version” of their goods; fail to address Applicants’ well-documented use in commerce domestically and internationally and fail to address the contention that Opposers have no intellectual property rights to the goods they claim. In fact, there is no evidence **anywhere** to suggest that Opposers were producing any goods of any kind at the time of the instant application. Instead, Applicants’ Motion to Dismiss cites objective, independent journalists who say that the items Opposers claim to have been serving in the restaurant **did not exist** on the menu at the time Applicants were applying for their mark. This undisputed fact destroys Opposers’ “real interest,” and, with it, standing.

The Supreme Court has held that a complaint tendered with mere “naked assertions” and devoid of “further factual enhancement,” will not do.⁷ As rejected by the courts, the instant Opposition contains only “[t]hreadbare recitals of the elements of a cause of action, supported by

³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 644, 555, 570 (2007).

⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁵ *Twombly*, 550 U.S. at 555.

⁶ *Iqbal*, 556 U.S. at 678.

⁷ *Id.*

mere conclusory statements.”⁸ The facts narrated must at least outline or adumbrate a viable claim to “pass Rule 12(b)(6) muster.”⁹ Opposers do not meet their burden to show that their claims are more than just speculative nor do they provide factual enhancement as to how Opposers have any right of ownership in any mark at this or any other time. Opposers provide only what courts deem unacceptable—naked assertions with no basis in fact or law.

The “real interest” requirement stems from a policy of preventing “mere intermeddlers”¹⁰ from bringing an opposition. Opposer Kaanache reveals herself to be an intermeddler by virtue of being a chef for hire at a failed restaurant which offered, and later discontinued, a savory seafood dish that Opposer Kaanache herself, described as “mini croquettes” shaped like a donut.

As a threshold matter, Opposers cannot clear the real interest hurdle. A savory dish at a closed restaurant in which Opposers had no monetary interest cannot be resurrected solely to mount an attack upon a valid mark. Moreover, according to Opposers’ own evidence, the appetizer bore no resemblance to Applicants’ Cronut pastry. Even if Opposers had an interest in the goods, it would not qualify for inclusion in the same category as Applicants’ pastry. The record is clear that Kaanache changed her “croquettes” to “creative donuts” *only after* Applicants Cronut pastry and brand had become famous world-wide. Opposers have not responded to this allegation and continue to try to confuse the panel with smoke and mirrors, which does not a real interest make.

As lacking as Opposer Kaanache’s real interest is, Opposer Crystalline Management’s (“CM”) interest does not exist. While Opposers suggest that CM was a “co-creator,” of a good there is no evidence to show that CM was affiliated in any way with the restaurant and therefore cannot be a co-creator. Bandyng about the term, “co-creator” does not make it so. Although Applicants strongly address this issue in its Motion to Dismiss, Opposers’ silence on the issue is

⁸ *Id.*

⁹ *Id.* at 678 (quoting *Twombly* at 555, 557.)

¹⁰ *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (1982).

informative. Neither Opposer shows more than a trite and dubious connection, but instead reveals Opposers to be mere intermeddlers without real interest and lacking standing to bring the instant Opposition.

Without a real interest, further analysis here is not warranted. However, Opposers also fail the second prong of the standing inquiry: a reasonable belief of damages. As fully briefed in Applicants' Motion to Dismiss, the Cronut pastry and brand is inextricably connected to Applicants. While Opposers haughtily dismiss the weight of Applicants' evidence as "irrelevant," Opposers fail to set forth a single viable reason as to how they are damaged by this fact. Applicants' Cronut pastry has received acclaim and superlative reviews in domestic and international media—acclaim that Opposers attach as evidence to their own Notice of Opposition. Food critics and diners alike have taken to the internet to defend Applicants' pastry as the true Cronut pastry against any and all comers, yet alone a fritter-like savory dish from a shuttered restaurant. Opposers not only have had an opportunity, but also a duty to submit some evidence of a reasonable belief of damages and have not. This failure exposes Opposers' baseless claims for what they are—blatant and utter falsehoods made in an effort to usurp a Chef's rights to his unique creation. It is entirely **unreasonable** to believe that Opposers could be damaged by Applicants' mark. The only damages in this vexatious and harassing Opposition is solely to Applicants.

Opposers Confuse A Donut, a Savory Dish and a Cronut Pastry

It is telling that Opposers submit, as their supporting evidence, an article entitled, "Letting The Air Out of Najat Kaanache's Cronut Scandal" which quotes from food critic Leslie Brenner's harsh one-star review of Kaanache's work. This article lends solid support for Applicants' position, yet Opposers choose to cherry pick it stating that the article "helps establish use of CRONUTS in February 2013" insisting that Brenner referred to Opposers' Cronut "goods" as "donuts".

The article refers to Opposers' goods as "swinging fritters" and takes aim at Kaanache's labeling of them as "cronuts." Opposers quote liberally from this unsupportive article deriding the dish as "cake-like fritters, much like cake donuts, but heavier and not exactly sweet." In reaching for a mere morsel of evidence—the use of the word "donut"—Opposers ignore not only the sum and substance of the article which supports Applicants' position but is notable in its blatant disregard for Opposer Kaanache's reputation as a chef. It is incomprehensible as to why Opposers would reference such a negative piece except for the fact that they are forced to do so because nothing further exists to substantiate the false assertions found in their pleadings.

Opposers also include, as their only other evidence, the description of the word, "doughnut" citing to an on-line dictionary. This is an insulting and disingenuous attempt to distract this Board from the fact that Opposer Kaanache characterized the product as a savory croquette which is, by definition and under the USPTO guidelines, a different category of goods. Opposers' alleged dish wasn't ever a doughnut and attaching a description of a doughnut to a pleading doesn't make it a doughnut. Instead it is another transparent attempt to confuse and mislead.

Further, it is significant that Opposers are vague in their use of the word, "CRONUTS" and fail to use it throughout, as required, as an adverb. It is undeniable that although the restaurant where Opposer Kaanache worked offered a dish called "cronuts" it was a play on the word croquettes with an occasional *shape* like a donut—although not a donut. As explained in Applicants' Motion to Dismiss and unanswered by Opposers, the appetizer disappeared when the restaurant introduced the "Awesome Texas Food" menu and Opposers' alleged item was not on any menu anywhere. By simply referring to their alleged item as "goods," Opposers create what is their ultimate pitfall: the inability to call it, as Applicants have, the Cronut **pastry**. Moreover, because Opposers have never illustrated the use of "creative doughnuts" on a menu, in an article, on a receipt or otherwise prior to the fame of Applicant's Cronut pastry, their claims fail.

Under the *duPont* Factors Opposers' Claims Still Fail

Opposers' elementary drafting mistakes have been remedied by Applicants' addressing them in subsequent pleadings, yet Opposers attempt to make conclusory remarks regarding Applicants' knowledge of the law. While suggesting that the correct "likelihood of confusion" analysis lies in *duPont* and not *Polaroid*, Opposers fail to explain how the minimal differences in the analyses would work on their behalf or weigh against Applicants. Since Opposers urge the *duPont* analysis, Applicants will oblige them by noting, however briefly, the heaviest weighted *duPont* factor is "fame", which rests clearly in Applicants' favor.

Under *duPont*, famous marks enjoy a wide latitude of legal protection because they are more likely to be remembered by the public and associated with a certain producer.¹¹ The *Kenner* court found that, "Achieving fame . . . in a marketplace where countless symbols clamor for public attention often requires a very distinct mark . . . and a product of lasting value. After earning fame, a mark benefits not only its owner, but the consumers who rely on the symbols to identify the source of a desired product."¹² Under *duPont*, when present, the fame of the mark is "a dominant factor in the likelihood of confusion analysis for a famous mark . . ."¹³ In its Motion to Dismiss, Applicants extensively document not only the fame of the Cronut pastry but the intricate connection between it and the producer of the goods, the Dominique Ansel Bakery.

However, Opposers, argue against applying any likelihood of confusion tests at this stage attempting to hoodwink the Board into believing there is substantive discovery to be taken. As evidenced by what they have submitted thus far, it defies logic to suggest that there is surprise evidence waiting to be mined. To continue this charade is to allow Opposers to abuse the system in such a way that they are not entitled to.

In its Opposition and in its response to the Motion to Dismiss, Opposers have misplaced "Opposers" for "Applicants" three times. These elementary, inexcusable and disrespectful

¹¹ *E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, (Fed. Cir. 1973); *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 352, (Fed. Cir. 1992).

¹² *Kenner* at 353.

¹³ *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1328, (Fed. Cir. 1992).

mistakes generate confusion. Despite their inability to muster even a basic level of decorum and respect for this panel and the consuming public, Opposers fail to argue even remotely what would be revealed in discovery that cannot be ascertained at this time. This level of pleading bombast combined with pleading carelessness reveals, yet again, the vexatious and harassing nature of the Opposition and the free-riding behavior that this Board has determined in other cases simply cannot stand.

Opposers Create Allegations and Claims Where None Exist

Applicants' registration mark and usage occurred during such time that the registration issued by the USPTO was valid. The USPTO canceled the registration due to Opposers' request for an extension of time and a clerical error at the USPTO failed to reflect this requested extension. Applicants ceased using the mark upon notice of the cancellation. However, the mark was officially registered as evidenced and attached to Applicants' Motion to Dismiss and at that time Applicants had every right afforded them with that registration. Contrary to Opposers' blatant misrepresentations, the assertions made by Applicants as it related to the international registration of the Cronut mark remain true.

Opposers' deliberate attempts to mislead this Board into thinking that there has been any wrong-doing by Applicants' counsel is egregious. Applicants' mark was only canceled due to Opposers' unscrupulous and intermeddling conduct. Not content to merely free-ride upon the good name and fortune of the Applicants, Opposition counsel has chosen to take an even further audacious position by besmirching the good name and reputation of Applicants' counsel. This shameless conduct cannot stand.

Opposers Fail to State Any Colorable Claim By Which Relief Can Be Granted

From the rudimentary drafting errors resulting in unintelligible sentences to the deplorable allegation of fraud, Opposers have failed to submit a single shred of evidence to support their claims. This Opposition must be seen for what it is: a baseless attempt to engage in

vexatious and harassing litigation and a transparent attempt to free-ride and cash in on that which they have not earned. Applicants' Motion to Dismiss is both substantively and factually weighty. Applicants have shown deference to the Board, to the consuming public and respect to Opposers' counsel whereas Opposers have shown none. Opposers fail to put forth even a basic showing of real interest or damages though they have been given two opportunities to do so.

It is expected and required that legal counsel exercise its duty to verify the validity of the claims it makes in motions, to the court and to this panel. Opposers have failed not once, but twice, to correct their pleadings where they make false statements on the record. The most flagrant misrepresentation is that the Applicants' registration was refused because of descriptiveness.¹⁴ This is an unabashed and blatant falsehood. The extent to which Opposers have gone in these pleadings is remarkable not only for the failure to state a claim on which relief can be granted but its unscrupulous attempts to discredit Applicants' counsel while engaging in contemptible dishonesty before this Board.

Opposers have repeatedly revealed themselves to be unethical intermeddlers with no cognizable claim, no real interest and no reasonable belief of damages. The true damage is to Applicants, the consuming public and the integrity of these proceedings. Opposers' failure to take their duty to this Board seriously is an egregious offense and these actions must end.

Conclusion

For the foregoing reasons, Applicants respectfully request that this Board grant its Motion to Dismiss with prejudice.

June 14, 2014

Dated: June 14, 2014

Candice S. Cook

By: Candice S. Cook

Attorney for Applicants

¹⁴ Amended Opposition at 13.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Reply Memorandum of law in Support of Applicants' Motion to Dismiss Notice of Opposition was served on Counsel for Opposer by certified mail and first class mail at the address below:

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CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 14th of June, 2014.

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